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ADDRESS DELIVERED BEFORE MISSOURI BAR ASSOCIATION, AT EXCELSIOR SPRINGS, MISSOURI, JULY 28, 1910.

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Mr. President, and Members of the Missouri State Bar Association:

We live in an age of progress, in an age when the business world, as well as the political world, has taken wonderful steps forward. Conditions surrounding us today are very different from those surrounding our fathers, our grandfathers and those before them. Even in religious matters we are told that we must look more to the substance and less to the shadow; that our religion must be a practical one, not theoretical. But in law, we find the lawyers and the judges following along some of the old paths, one and even two centuries old. It is my purpose to point out to you briefly some of the defects in the criminal code of Missouri, which to one not a practicing criminal lawyer and to a layman will seem almost absurd.

First. The first defect to which I would call your attention is that of requiring indictments, especially in cases of homicide, to be so lengthy. The theory of the indictment is, that it shall inform the defendant what crime he is charged with. Usually, the defendant never sees the indictment and never hears it read until it is read in open court to the jury. And the jury, to whom the indictment is read, and who are presumed to understand it, forget it as fast as it is read and never refer to it after going to the jury room. Take, for example, an indictment charging murder in

the first degree. Under our law, it is necessary for that indictment to state, first, the county and State in which it is returned, although no one ever heard of the grand jury of Jackson county returning an indictment in the Circuit Court of Johnson county. But for fear that twelve men, with enough intelligence to serve on the grand jury, might go to another county and return an indictment there, and for fear that a circuit judge of one county might receive an indictment from a grand jury of another county, the indictment must state in which county it is returned, and by the grand jury of which county it is found. It is also necessary for the indictment to state that the grand jurors have been duly empaneled, charged and sworn, although the records of the court show the empaneling of the grand jury, and the further fact that said grand jurors were charged and sworn by the judge of that court. In case several hundred indictments are returned, this fact must be gone over in each indictment, and the grand jurors must state in the indictment that it is returned upon their oath, although all that they do while so serving is under oath. But the most unnecessary part of the indictment is yet to follow. Not only must the criminal pleader allege that the defendant wilfully, deliberately, premeditatedly and of his malice aforethough made an assault upon the deceased, but he must also allege that, by reason of said assault, whether stabbing, striking or shooting, the wound was inflicted, wilfully, deliberately, premeditatedly and of his malice aforethought. How A could assault B wilfully, deliberately, premeditatedly and of his malice aforethought, with a deadly weapon, and inflict a wound

in some manner other than wilfully, deliberately, premeditatedly and of his malice aforethought is a question that has never been explained. Yet the assault must be charged to have been so committed, and the wounding must be similarly charged. (State vs. Williams, 184 Mo. 261.) Not content with that, our criminal pleader is required to add, in case of shooting, that the defendant had a certain fire arm, describing it, which he then and there had and held in his hand, which pistol or gun was then and there loaded with gunpowder and leaden balls, which the defendant proceeded to shoot off and discharge, and that by reason of the force of the gunpowder aforesaid, the bullet was shot out of said gun and struck, penetrated and wounded the body of the deceased, etc., etc. Our courts have often held that the *probata* must agree with the *allegata,* and many have been the cases where reversals have been had because there was no such agreement. Yet, no one ever heard of the prosecuting attorney attempting to prove, or being required to prove, that the pistol with which the homicidal act was committed, was discharged and that the bullet left said pistol by reason of the force of the gunpowder aforesaid, nor that the ball struck against the body of the deceased, and, by reason of the force of the gunpowder, and by reason of it being shot out of the pistol aforesaid, penetrated the body of the deceased. Neither is any prosecuting attorney ever required to prove that the grand jurors that returned the indictment, were duly empaneled, charged and sworn, although the indictment must contain that allegation in two places; nor is he required to prove

that the man whose name is attached to the indictment, as prosecuting attorney, was in truth and in fact the duly qualified prosecuting attorney, nor that the man who signs as foreman was in truth the foreman of said grand jury. The only proof that is ever required in such a case is that the defendant fired his pistol at the deceased, and the further fact that the deceased died from the effects of the wound which he then received. Neither has any prosecutor ever been required to prove that the pistol was in fact loaded with gunpowder, nor that the balls were made of lead. And certainly we all agree that such a requirement would not only be useless, but in some instances it would be impossible to prove what kind of an explosive was used; and, in case the ball passed through the body of the deceased and was not found, it would also be impossible to prove whether said bullet was made of lead, steel or iron. I do not see any reason for such strict requirements in the proof in one instance, and for absolutely no requirements of proof in the other instances. Certainly our law-making body has wisely deemed it unimportant for the State to prove about the force of the gunpower, and unimportant to prove about the material out of which the bullet was made. If it is absolutely unnecessary for the State to prove those things, why is it necessary for the State to allege those things? Certainly our law in that respect needs amending. It is proper for the indictment to allege the time when the crime was committed, and all of us will admit that a defendant should know the time and place he is charged with committing a crime, so as to be able to

prepare his defense, which may be an alibi, or which may be that his physical condition was such as to make it impossible for him to have traveled a certain distance and been at the place of the commission of the crime at the time charged, or impossible for him to have committed such a crime at that time. Although the State must name some time, the State may prove that the felony was committed at any time within three years prior to the finding of the indictment, and in capital cases, proof that the crime was committed at any time prior to the finding of the indictment is sufficient. Surely in reference to time, which often is of the essence, the *probata* need not agree with the *allegata*. But, again, our court records may show that the grand jurors were sworn in open court, and the beginning of the indictment may charge that the shooting and wounding of the deceased was done wilfully, deliberately, premeditatedly and of his malice aforethought, unless the concluding part of the indictment says, "and the grand jurors aforesaid, upon their oath aforesaid," said indictment only charges manslaughter. It is impossible for any one to see how the words "wilfully, deliberately, premeditatedly and of his malice aforethought," may be used, which words all of our law writers hold are descriptive of the crime of murder in the first degree, and yet the indictment simply charge manslaughter. At the beginning of the indictment, there may be an allegation that the grand jurors were sworn, the records of the court may show that they were sworn, but it is further necessary for the concluding portion of the indictment to reiterate the fact that the grand jurors were sworn in order for the indictment,

which may otherwise be sufficient to charge murder in the first degree. (State v. Meyers, 99 Mo. 107.)

And it has been held necessary to have such a concluding paragraph in an information, in order to charge first degree murder (State v. Minor, 193 Mo. 597). Although a stickler for established forms and precedents, I must confess that I can not see what the allegation regarding the swearing of the grand jury, and the reiteration of the fact that the grand jury was sworn, has to do with the degree of the crime with which the defendant is charged. Yet our courts have held in more than one instance that an indictment, which fails to have the concluding portion recite, "the grand jurors aforesaid, on their oaths aforesaid," simply charges manslaughter. In other words, it was held in the Morgan case (196 Mo. 177) that the grand jurors may charge a defendant with manslaughter, without referring to the fact that they were sworn, but if they desire to charge a defendant with murder, they must twice refer to the oath that they have taken.

Again, our Supreme Court held that an indictment must conclude with the words "against the peace and dignity of the State;" and that the omission of the word "the" before the word "state" constituted a fatal defeat. (State v. Skillman, 209 Mo. 408). The reason assigned by the court for thus holding was that those words were required, by section 38 of article 6 of the State Constitution, to be the concluding part of all indictments.

Second. In the case of State v. Miller (162 Mo. 253) our Supreme Court held that the wife of David Miller was improperly convicted of conveying weapons

to her husband, who was a prisoner in jail. David Miller had been convicted of murder in the first degree, his case had been affirmed by the Supreme Court, and the day of his execution was drawing near when his wife procured a pistol, concealed it about her clothing, visited her husband's cell, and gave him the pistol. Fortunately, the plot was discovered and the pistol taken from David Miller before any one was injured. The wife was indicted, tried and convicted, as above stated, but her case was reversed by the Supreme Court on the ground that she being the wife of David Miller was under his influence, and acted under compulsion of her husband, and was therefore not responsible for any crime that she was thereby compelled to commit. Accordingly she was discharged, as the court found that the husband was present at the culmination of the offense, and participated with her. In this day and age, when women have more rights than men, when a woman can contract and be contracted with, can sue and be sued, and when the woman is so many times *the* head of the household, it is difficult for lawyers, as well as laymen, to understand how a woman could act under compulsion of her husband, when he was in as helpless a condition as he could well be, and she was living in a house some three-fourths of a mile away from the jail. It reminds me of a story I heard of a justice of the peace, who asked a portly lady if she signed a certain deed without fear or compulsion or undue influence of her husband. She indignantly replied, "Fear, compulsion, he compel me— Why, bless my life, you do not know me, Judge."

Third. Our law is too strict in requiring petit

jurors to return the verdict in legal form. Where there are several degrees of the offense, I admit that the jury should state the degree of which they intend to convict the defendant. But where there is only one degree, only one count in the indictment, and the jury are not concerned with any other case against the defendant, it does seem to me that our law is too strict in the matter of requiring the verdict to be so technical. In the case of State v. Cronin (189 Mo. 663), our Supreme Court held that the defendant, who was tried for establishing a policy as an avocation in Missouri, and who was convicted by the jury, and whose punishment was assessed at two years in the penitentiary, was improperly convicted, and was entitled to a new trial, simply because the verdict said, "We, the jury, find the defendant guilty of establishing a policy, and assess his punishment at two years in the penitentiary." The reasoning in that case was that it was no crime to establish a policy, but that the crime consisted in establishing a policy as an avocation, and that the jury failed to convict the defendant of that. In a number of instructions in that case, the jury were properly told of their duty and the charge pending against the defendant, which instructions met with the approval of the Supreme Court, and there was no pretense or claim that the jury were trying the defendant for any other charge, and yet that defendant was accorded a new trial for that failure, and thereby another opportunity given to those who desired an opportunity to complain of technicalities in the law. If the defendant was deprived of any rights by reason of the failure of the jury to make that verdict a little

longer or to make it a little shorter, either one of which the court said would have been sufficient, he certainly did not, by his learned counsel, attempt to show.

Fourth. Another serious defect in our criminal code is the abuse of the law on the subject of continuances, and on the subject of change of venue. It often happens, indeed in some counties it is the practice, for the defendant in a criminal case, who is out on bail and who is interested in dodging a trial, to procure as many continuances from the regular judge as possible, and when his last application for a continuance is overruled, to ask for a change of venue on account of the prejudice of the judge, and thereby secure another delay. After the new judge is called in, another delay is asked for on the ground that the defendant has just then discovered that the inhabitants of the county are so prejudiced against him that he can not have a fair and impartial trial. I was told of such a defendant; he asked for a continuance at the first term, after he was indicted, on the ground that his only attorney was a member of the Legislature and that it was impossible for that attorney to be present and take part in the trial. The continuance was granted, although that attorney was able to leave his duties at Jefferson City, and take part in the trial of every civil case which he desired to try at that term. At the next term of court, the defendant asked for and obtained a continuance because another lawyer was sick, he then being the defendant's main attorney. A third continuance was obtained on account of the sickness of still another attorney who by some means became the defendant's

only attorney who was familiar with the case, and able to represent the defendant at the trial. A fourth continuance was obtained because of the unexplained absence of an important witness, who was the defendant's son. A fifth continuance was obtained because the defendant was sick, so a physician (a relative of the defendant) made affidavit. By the time the sixth term of court was reached, the defendant's main attorney was back in the Legislature. Whether that defendant will ever be tried or not has become, so I am told, a serious question in the minds of the inhabitants of that county. I once knew a defendant who had three attorneys, but he employed a fourth one, who was a member of the Legislature simply for the purpose of procuring a continuance. I know there are times when a judge is prejudiced against a defendant; and, when that is the case, the defendant's attorney ought not to hesitate to ask for a change of venue. And, when the inhabitants of the county are prejudiced against a defendant, his attorney ought to ask for a change of venue, and the circuit judge ought to promptly sustain his application. But I protest against a lawyer asking for a change of venue, simply for the purpose of securing another delay. Defendants, unfortunately, are many times able to procure the affidavit of some physician in reference to the defendant's health, or the health of some one of the defendant's witnesses, which is not true. I heard Judge Daniel G. Taylor, of the St. Louis Circuit Court, say to a doctor who had just made affidavit in regard to the sickness of an old lady who was one of the defendant's witnesses: "You doctors are always making affidavit in regard to the witnesses

being too sick to come to court, and yet I have never known a witness to be made sick by coming to court, or who has suffered any ill effects by reason of coming to court. In fact, I have known witnesses, who were said to be too sick to come to court, but who did come under process, and who enjoyed the trial so much that they remained long after they were discharged."

Fifth. Every defendant is entitled to know what is the charge pending against him. But it has been held by our courts of last resort that the record of the circuit court must show that the defendant has been arraigned, or must show that he has waived formal arraignment, and that the failure of the record to so show is error, and may be taken advantage for the first time in the higher court. (State v. Sanders, 53 Mo. 234.) Although a defendant may answer "ready for trial"; may take depositions preceding the trial; may introduce evidence contradictory to that introduced by the State; and may be represented by learned counsel who fully understand the charge against him and who may make able arguments in his behalf in the *nisi prius* court as well as in the appellate court, yet he must have a new trial because of this inadvertence of the clerk of the circuit court.

Sixth. Our statutory requirements for the qualifications of jurors is unreasonable and is in conflict with the original theory upon which jurors are selected. Law writers tell us that originally twelve men of the county were selected to try a defendant because of their acquaintance with the defendant and all of the circumstances connected with his case. Now, jurors must know nothing about the case, and our law is fast going

in the direction of requiring jurors never to have read or heard of the case before. In the cities, as well as in the country, our industrious newspaper men are eager to get all the details connected with all criminal cases and these details are published in our metropolitan as well as in the weekly journals. Of course all intelligent people read the newspapers; and, of course, they read these articles which appear in a prominent place and have a heading in large print. Many, many, good citizens are, by reason of having read the newspapers disqualified from serving on juries, and other persons must be selected in their places.

On the subject of having formed an opinion, I have heard a story told on General John B. Clark, one of the Central Missouri pioneer lawyers, who was exceedingly anxious to get a change of venue from the county where his client was indicted for murder. His client was a man of wealth, and the county did not, at that early day, have a large population. So General Clark employed two men, the one with a petition asking the governor to pardon his client if he was ever convicted, and the other with a petition asking the court and jury to hang his client for the commission of that crime. Before the trial term of court was reached, nearly every man in that county had signed one or the other of these petitions. After spending two days trying to select a jury and after hearing from the venire summoned that they had all formed or expressed an opinion, and had taken sides in that case, the trial judge was forced to grant the defendant a change of venue.

Brethren of the Bar: These defects ought not to

exist in our criminal code. I would not for one moment ask that a defendant be deprived of the presumption of innocence; neither would I take the burden of proof from the State; nor would I require the defendant to establish his innocence to the satisfaction of the jury; nor would I take away from the defendant a reasonable doubt; nor would I take from a defendant the right to have the law properly declared to the jury in plain and simple language. Every defendant is entitled to the presumption of innocence until that presumption is overcome by legal proof by the State; and every defendant is entitled to a fair trial. But I do say that a defendant ought not to have the benefit of useless technicalities which do not result in any material benefit to him—a benefit which he has a right to claim. How, for example, is the cause of justice benefited by having the indictment repeat the fact that the grand jurors were sworn? How is it benefited by having the prosecuting attorney copy the long string of words about the force of the gunpowder and the bullet, which received its momentum by reason of the gunpowder aforesaid. I agree with our forefathers that the conviction of an innocent man would be a calamity; and that "better let ninety-nine guilty men escape than to have one innocent man to suffer." But the guilty men, who escape, should escape because there is a reasonable doubt of their guilt; and not because the prosecuting attorney writes the words "then and there" at the wrong place in the indictment, nor because he omits to write the word "the" in its conclusion, nor because the circuit clerk omits to write the words "formal arraignment waived." A simple indict-

ment charging that a defendant at a given time and place killed the deceased, naming him, by shooting him with a pistol and that the act was done deliberately, wilfully, premeditatedly, and with malice aforethought, would be an indictment that could be understood by any defendant who could read. Whereas, the present Missouri form of indictment for homicide, so far as informing the defendant is concerned, might as well be written in a foreign language. Long ago, we eliminated from our indictments the allegation that the defendant "did not have the fear of God before his eyes," and also that he was "instigated by the devil." And the pruning process may be pursued still further with profit. But it has been argued, "murder is a serious charge, and the indictment ought to be definite." I admit that the indictment ought to be definite, but lengthening an indicment tends rather to make it indefinite. Besides, the crime of rape is a serious one; it may be punishable by death or life imprisonment, yet our indictment for rape is a model of brevity.

And still further, I insist that if an indictment or information is defective, the defendant should call that fact to the attention of the court before trial. He should not be allowed to get all the benefits of a trial, and perhaps one or two mistrials, and then for the first time, in the Supreme Court, raise the point that the indictment or information was defective.

If a defendant does not know the charge pending against him, or if he desires to be better informed on that subject, he should be required to make timely request therefor. If he fails to make such a request, he should be held to have waived it, as our law holds that

he can and does waive many rights and privileges. The defendant is now required to file a motion to quash an information, and to file such a motion before the trial, or he waives the fact that the information is not verified (State v. Brown, 181 Mo. 192). Certainly the verification of the information is as important as a record entry (which the defendant never sees) to the effect that the defendant was formally arraigned, or that he waived formal arraignment.

And our law should be amended on the subject of the competency of the jurors. A man should be permitted to serve on juries even though he has read the newspaper. It is a fact, well known, that our people read of so much crime, and read so many articles on other subjects, that the impression gathered from the newspaper accounts would not prevent them from trying the defendant's case just as judges try said case, although the judges have also read the newspaper articles about said case, but try the case according to the law and the evidence.

Our law in regard to the commission of crime by women should be changed so as to make a woman responsible for every crime that she commits, unless forced to commit the crime, not by legal fiction, but forced in reality. In the case of State v. Miller (191 Mo. 587), our Supreme Court approved of the action of the trial court in permitting evidence to be introduced tending to show that there was a conspiracy between the defendant and his wife for the purpose of taking a little girl from her father's home to the State of Iowa, for purposes of immorality.

The Supreme Court explained that, under the circumstances, this evidence was admissible against the defendant, as there was no positive evidence offered that the woman was his wife, although living and traveling with him, calling herself Mrs. Miller and calling herself his wife. Why should not a woman be guilty of a conspiracy, even with her husband, if she and her husband were guilty, as the evidence showed, of the crime therein charged? And why should not a woman suffer the same penalty that the husband suffered, by reason of his outrageous criminal conduct? Instead of a woman being immune from punishment, her conduct was more reprehensible, and her punishment should have been greater. As far as the question of the influence of the man over the woman is concerned, in reference to the commission of a crime, it is a fact well known that the influence exerted by a man over a woman, or by a woman over a man, when they are living in adultery, is far greater than the influence by a man over a woman or a woman over a man living in lawful wedlock. And the other Miller case, to which reference has been made, where the wife conveyed a pistol to her condemned husband, was certainly a case which illustrates the fact that the wife, in no aspect of the case was acting under the compulsion of the husband; he being locked in a cell, and the jail being remote from the place where the pistol was procured.

Our law should be amended so as to permit men of average intelligence and of average experience in legal matters to return a verdict in a form so that the same may be understood. In the gambling case, to

which reference has been made, the jury returned a verdict finding the defendant guilty of establishing a policy. The defendant understood what he was tried for, and the jury understood what they convicted him of; yet the case was reversed simply because the jury did not go into details of explaining the charge as made in the indictment. If it is necessary for the jury to find the defendant guilty of establishing a policy as a business or avocation, why was it not also necessary for the jury to go still further and to say in their verdict that they found the defendant guilty of establishing a policy as a business or avocation at a certain time, at a certain place, and against the peace and dignity of the State? Following this line of argument still further, why should not a jury, in a case of homicide, state in their verdict that the defendant was guilty of murder by shooting the deceased wilfully, deliberately, premeditatedly and of his malice aforethought? When the jury found the defendant guilty of establishing a policy, we all know that they found him guilty of the charge for which he was then tried, and not for any other charge, and our courts should be in a position to so hold.

As stated, the law on the subject of continuances has been abused more than any statute, perhaps, on our statute books. A defendant should not be allowed to use that law as a trial dodger, as too often occurs. If the State is required to give the defendant a speedy trial, the defendant should be required to submit to a speedy trial. No good can result from long delays, that is, no good to the State, but the defend-

ant hopes, by reason of said delays, to receive benefit, and always does receive benefit thereby. A military gentleman once said to me: "I believe that there is more substantial justice in a military trial than in any criminal trial I have ever witnessed in our State courts. Before the witnesses have an opportunity to forget what was really done, before they have an opportunity to leave, and before other witnesses have an opportunity to make up evidence favorable to the defendant, the military tribunal try the defendant, and either acquit or punish him for his conduct." In Missouri, the defendant has the benefit of hearing the evidence produced before the coroner, and he has the benefit of hearing the evidence produced before the justice of the peace some days later. He has the benefit of hearing the evidence produced by the State at the trial in the circuit court, some months and even years later. The defendant's attorney is and should be entitled to time in which to prepare for trial; and the defendant should have a continuance for good cause shown, but only for *good cause.* One noted criminal case, to which I might refer, was delayed for seven years by reason of the absence of a witness who was alleged to have existed, but who was never seen *by any one, save the defendant.* At the final trial, on account of the death of two important witnesses for the State, and the insanity of a third witness, the State had great difficulty in proving that the deceased was ever killed.

It is not proper for lawyers in the discussion of such a subject as this to criticise the judges of the ap-

pellate courts for unfortunate delays and unfortunate legal technicalities, though it has become popular for the people, the press and even the pulpit to indulge in such criticism. Gentlemen of the Bar, the blame rests with us; we are responsible for this unfortunate condition. We have been negligent; and, in doing our duty to our clients, we have taken advantage of legal technicalities, none of which had any bearing on the merits of the charge pending against him. The judges of our courts cannot make the law, we all know they can simply construe and interpret the law already made. The members of the General Assembly are not entirely to blame for this condition, as they are a very busy lot of men. During the seventy days of a regular session more bills are introduced into that body than any man can possibly read over and understand. Besides, many of our legislators are not experienced in legal matters; they come from different walks in life, and are accustomed to the investigation of other subjects. Many of them are lawyers, engaged in the practice of civil law and not familiar with our criminal code. Still others are experienced criminal practitioners, but have been negligent in looking after the interests of the State, and so other matters absorb their attention. It is the duty of the lawyers of our State to call these matters to the attention of the public. It is our duty to prepare suitable bills for the General Assembly and to urge the passage of said bills. Some of the needed changes can not be made by legislative enactment, but must be made by the submission to our people of a constitutional amendment. It is our duty, fellow-lawyers,

to prepare these constitutional amendments and urge the General Assembly to submit them at the coming election. Our courts are governed by cast-iron rules, and our judges would themselves be violating the law if they deviated from the rules prescribed by our statute and by our Constitution. Hence, the blame can not rest upon their shoulders. I honor and respect the judges of our higher courts, and the judges of our circuit courts, because they follow the letter of our written law, even though their opinions thereby are subject to popular criticism. Although many laymen, and some lawyers, indulged in criticism of our Supreme Court when that court decided that the word "the" was necessary in the conclusion of an indictment or information, yet I have never heard of any lawyer or layman taking any steps towards having our Constitution amended on that subject.

In the light of the matters that have been herein mentioned, I trust that the lawyers of this association will join with the lawyers in all parts of our State in performing a great duty, which the legal profession owes to the State of Missouri, the duty of correcting some serious defects in our criminal code. In this day of advancement, the legal profession should step forward, as have the professions of medicine, journalism, pedagogy and others. I am proud to say that the lawyers and judges of Missouri have always responded to the call of duty, and have always done their part toward aiding the people of our great commonwealth in the work of progress; and I believe in these matters, the lawyers will not be negligent in the discharge of their duty, but will be faithful even unto the end.

There seems to be a growing demand all over our State for a change in our criminal code; and, unless the conservative lawyers see that some needed changes are made, there is danger of the pendulum swinging to the other extreme, and our criminal code will be remodeled by some so-called reformers, who will deprive all those charged with crime of many substantial rights.